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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a computational mechanics researcher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Engineering, specializing in solid mechanics, from Tsinghua University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ."

[redacted]

Supplementary information to the regulations implementing the Immigratio[redacted]

[redacted]

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, engineering, and that the proposed benefits of his work, improved ability to simulate damage to aircraft, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The director concluded that the record did not distinguish the petitioner from others in the field. The bases of this conclusion appear to be that the reference letters did not reflect that the petitioner's work had influenced other independent researchers in the field and that objective evidence of his influence, such as citation of his published work, was lacking.

On appeal, counsel raises several arguments, not all of which are persuasive. For example, counsel asserts that the director should have considered that the petitioner's employer has a policy not to seek labor certification for its prospective employees and that funding issues prevent the petitioner's job from consideration as "permanent" for immigration purposes, making labor certification impossible. An employer cannot obligate Citizenship and Immigration Services (CIS) to waive the labor certification process by choosing not to pursue that process. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. [redacted] Moreover, the temporary nature of many research positions is not persuasive. It is the position of CIS to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization. [redacted] We cannot conclude that the national interest waiver was intended as a blanket waiver for all researchers. Finally, while the inapplicability of the labor certification process will be given due consideration in appropriate cases, it cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. [redacted]

Counsel further focuses on the intrinsic merit of the petitioner's work, noting that it is applicable to the national defense and asserting that the United States is in "a time of national crisis and war." Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. We do not question that providing the safest aircraft is an important national interest, whether or not we have troops deployed in dangerous situations. The intrinsic merit of the work, however, does not warrant approval of every competent researcher able to produce results that add to the general pool of knowledge and improve upon existing technology. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The primary basis of the petitioner's eligibility claim is his development of the AGILE software package in the laboratory of [redacted] at the University of California, Irvine (UCI). According to [redacted] member of the National Academy of Engineers, the petitioner was the project manager of this project, which involved developing software for damage tolerance analysis for rotorcraft and the development of safe-life estimation methodology. [redacted] a professor emeritus at the University of Washington who has collaborated with the petitioner, provides the most detail regarding AGILE. He states:

> [The petitioner] has made a singular contribution in the pioneering and refinement of a probabilistic approach to provide quantitative risk measurement at a programmatic level; developed illustrative examples of inputs, results, and interpretation; and developed a user interface enabling non-experts in probabilistic mechanics to perform sensitivity studies without the need to contact experts in various engineering fields. Previously, these lengthy studies could only be performed by highly educated and formally trained individuals. Specifically, he has played a leading role in the development of the AGILE software package (AGILE) to perform damage tolerance analysis. This package uses a highly efficient and accurate [method] (FEAM). The implementation of this process will empower engineers and their respective corporations or government employers to perform such sensitivity studies faster, cheaper and more accurately than ever before. It represents a major advance in the area of damage tolerance and prediction of fatigue behavior of stressed aircraft components.

[redacted] asserts that AGILE "is officially recognized and used by the FAA, and has been integrated into the operations of the Boeing Corporation [redacted] and in continuing design and manufacturing work on the SeaHawk and BlackHawk military aircraft." [redacted] also asserts that AGILE has been adopted by the FAA. [redacted] a consultant for the FAA and a member of the National Academy of Engineers since 1986, while not explicitly confirming that the FAA has adopted AGILE, affirms the significance of the advances represented by this software.

The petitioner also submitted five articles and a report, although only two of the articles reflect that they were published in peer-reviewed journals. As noted by the director, the record contains no evidence that any independent researchers have cited this work. Independent citations are often useful evidence for gauging a researcher's impact on the field. While frequent citation can certainly bolster a researcher's claim to have influenced the field, the lack of frequent citation is not a bar to eligibility where other objective evidence of the petitioner's influence exists. Engineers designing new technology may not disseminate their most significant

work for intellectual property reasons or because it is limited to a narrow segment of the field. Other evidence, such as licensing agreements or affirmations from government agencies or industry officials who have adopted the technology must be considered.

The letters submitted prior to appeal are not as overwhelming as counsel asserts. First, they are all from collaborators and the consultant from the FAA who oversaw the FAA's grant to [redacted] laboratory. In response to the director's request for additional evidence, counsel relied on a non-precedent decision from this office for the proposition that letters from the alien's immediate circle of colleagues cannot be discounted. As correctly noted by the director, that decision is not binding on CIS and, without the full record of proceedings, we cannot evaluate all the evidence presented in that case. Regardless, the plain language of the decision does not imply that letters from collaborators are always sufficient. Rather, it notes that only four universities in the United States graduated more than 10 Ph.D. gearing specialists in the last 40 years, indicating the highly unusual scarcity of experts in the field relevant to that petition. The decision also notes the submission of a letter from a client of the alien's employer. In engineering cases, letters from clients are more persuasive evidence of the adoption of the alien's technology than letters from collaborators.

In the matter before us, all of the letters submitted prior to appeal were from collaborators except for the letter from [redacted] who does not confirm that the FAA had adopted AGILE. Counsel's assertion that one's immediate circle of colleagues are in the best position to evaluate one's work does not persuade us that letters from more independent sources are not also useful. While letters from colleagues are important in establishing the petitioner's role on a specific project, they cannot establish the influence of the work outside the petitioner's immediate circle of colleagues. We acknowledge that both [redacted] are members of the National Academy of Engineering, a sign of their high-level status in the field. We cannot help but note, however, that the assertions made by the petitioner's references, such as adoption of the petitioner's software by the FAA, Boeing, and others, could be easily confirmed by those entities.

Such confirmation is provided on appeal. [redacted] Chief Scientist at Galaxy Scientific Corporation, asserts:

> Among my most important tasks is working with U.S. rotorcraft industry (Sikorsky Aircraft, Bell Helicopter, and Boeing Helicopter) to evaluate the crack growth analysis tool **AGILE, whose primary developer, from its inception, is [the petitioner].** Under FAA and industry auspices, the program is being continually refined and applied to various design and service life issues involving both military and civil aircraft. Recently, the AGILE code has been completely overhauled and new algorithms were implemented, thereby enhancing its accuracy, efficiency, and user-friendly qualities. **Once more, [the petitioner's] role is central to these continuing development efforts. Based on evaluation results to date, the U.S. rotorcraft industry has indicated that the AGILE code will probably continue to be among the primary "fatigue crack growth analysis and damage tolerance" design tools for aircraft design.**

(Emphasis in original.) [redacted] of the U.S. Army Research Office (ARO) provides further confirmation of the significance of the petitioner's work. [redacted] is a senior scientist with ARO, a civilian Senior Executive Service position equivalent to a Brigadier General. [redacted] explains that the prior software used to predict the effects of blast and projectile penetration of Army systems (FEM) failed to provide realistic and predictable effects. [redacted]

> Based on my several visits to UCE and interactions with [the petitioner] and [redacted] as well as my consultation with a few leading Scientists and Engineers working in the computational directorate of ARL, I identified the Meshless Method Technology developed by [the petitioner] and his colleagues at UCE as a possible alternative approach to model fracture and fragmentation of structures due to blast loading.

[redacted] concludes that the petitioner's software "has directly and significantly benefited the defense industry in America" and that the meshless method approach "will overcome the major deficits in the existing FEB based software technology."

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.